No. 83-233

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

IRA SHUTTS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court
Of The State of Kansas

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN

Alan B. Morrison
David C. Vladeck
(Counsel of Record)

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Amicus Curiae
Public Citizen

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INTEREST OF *AMICUS CURIAE* PUBLIC CITIZEN

This case raises the question of whether the due process clause of the Fourteenth Amendment precludes a state from including in a plaintiff class persons who are non-residents of the state and who have no connection with it except as class members. The outcome is likely to have a significant effect on the ability of individual states to handle burgeoning litigation through class actions.*

Public Citizen is a nonprofit public interest organization, supported by contributions from more than 50,000 in-

* This brief is filed with the consent of the parties. Copies of the letters granting consent have been filed with the Clerk of the Court.

dividuals each year. Because Public Citizen believes in the importance and necessity of the nationwide class action device as a means of ensuring that relatively small but widely shared claims are resolved, and because its supporters have periodically benefitted from nationwide class action litigation, the interests presented by Public Citizen in this case are the interests of the non-resident class members.

In this regard, Public Citizen believes that its brief will assist the Court because its analysis of the due process issue differs markedly from that advanced by the parties, the other *amici*, and the Kansas courts. Public Citizen contends that the appropriate method for deciding whether due process has been met is to analyze the question under the principles enunciated in *Mathews v. Eldridge*, a case not previously relied on by anyone else. In our view, a determination of "what process is due" to non-Kansas class members is best decided by applying the three criteria set forth in *Mathews*, not by discussing the applicability of cases such as *International Shoe Co. v. Washington*, 326 U.S. 310 (1940), in which defendants were sued in states other than their residence. Because this case involves the very different interests of unnamed, non-resident members of a plaintiff class, the due process cases establishing where a defendant may be sued are simply not relevant. Since the analysis advanced by Public Citizen is fundamentally different than that offered by either party or any other *amicus*, this brief should provide a useful addition to the Court's consideration of this matter.

STATEMENT OF THE CASE

Respondents Irl Shutts, Robert Anderson, and Betty Anderson filed this class action against petitioner Phillips Petroleum Company ("Phillips") in the District Court of Seward County, Kansas, alleging that Phillips had improperly withheld interest on certain royalties payments. These royalties related to the oil and natural gas that Phillips produced from leaseholds in eleven states, including Kansas. There are 33,000 royalty owners residing in all 50 states, the

District of Columbia, and several foreign countries. Approximately 1,000 class members, including the named-plaintiff Shutts, are residents of Kansas.

Over the objection of petitioner, the Kansas Supreme Court upheld the District Court's certification of a nation-wide class of 28,100 members. The class included all of the royalty owners with the exception of 3,400 who opted out and 1,500 to whom notice could not be delivered. The Kansas Supreme Court also affirmed the District Court's determination that Phillips was liable for interest on all royalties at issue and left intact the lower court's ruling that the pre-judgment interest rates should be set by reference to applicable federal regulations. The Kansas Supreme Court held, however, that post-judgment interest should be calculated at the highly favorable fifteen percent Kansas statutory rate instead of the federal regulatory rate which was substantially lower. Under the terms of the judgment below, the class recovered over $3,000,000 in unpaid interest, entitling class members to an average payment of approximately $100.

Despite the highly successful result in this litigation for both Kansas and non-Kansas class members, the petitioner asks this Court to overturn the decision of the Kansas Supreme Court not because its rights have been violated, but on the ground that the due process rights of the successful non-resident members of the class have been violated by the order granting certification of a nationwide class.

SUMMARY OF ARGUMENT

I. This Court should dismiss the writ of certiorari for want of jurisdiction for two closely related reasons. First, the party alleging the due process violation—the petitioner Phillips—is not a non-resident member of the plaintiff class whose due process rights are at stake, but is instead the *adversary* of the entire class. This Court has held that, in general, a person lacks standing to rely on, or assert, the rights of another, with certain limited and well-defined exceptions. *Singleton v. Wulff*, 428 U.S. 106, 113-16 (1976). Whatever the extent of

those exceptions, no case has ever permitted a party with a directly adverse interest to the ones whose rights are at stake to assert those rights. Accordingly, petitioner's due process claims, which are based on the rights of non-Kansas members of the class represented by respondents, should be dismissed because petitioner lacks standing to assert them.

Second, because no non-resident members of the class are before this Court to advance this due process claim, this claim lacks the concreteness and specificity necessary for adjudication. While Phillips speculates about the potential deprivation that may be caused to non-resident class members, nothing in the record supports its self-serving conjecture that there will in fact be any demonstrable injury to non-resident members of the class. No non-resident members have come forward to raise this claim, and class members who desired to proceed independently had an absolute right to do so by opting out of the class.

2. In any event, there has been no violation of due process because the non-resident class members have been given all of the procedural protections to which they are entitled under the three-part balancing test established by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which focuses on: (a) the private interest of the class members, (b) the need for additional procedural protections, and (c) the governmental interests at stake—including the administrative and financial burdens—which would attend affording greater protection.

The facts in this case clearly demonstrate that the standards of due process have been met. First, the private interests of the class members, measured at the outset of this litigation, were simply their unliquidated claims against Phillips, which had value only in the event that the class prevailed. Second, because of the commonality of interests among the class members, and because the Kansas courts found that the class was adequately represented in granting class certification, the procedural protections afforded non-Kansas class members were plainly adequate, particularly in light of the unqualified right to opt-out and the exclusion of class members to whom

notice could not be delivered. Third, Kansas has agreed to accept the substantial burden of handling a nationwide class, and no class member has expressed an interest in litigating the matter on behalf of the class elsewhere. Accordingly, allowing the action to proceed in the Kansas courts ensures a forum for this litigation and conserves scarce judicial resources. Therefore, since all three factors support the maintenance of a class including both Kansas and non-Kansas members, due process has been satisfied.

ARGUMENT

Introduction

At the outset, it is worth underlining the obvious: no prior decisions of this Court determine the outcome of this case. Some of the cases cited by the parties are useful by analogy; others, which reached the same result as did the court below, arose in contexts which are arguably distinguishable; and most of those relied on by petitioner are not cotrolling or even relevant because they deal with the far different question of whether a *defendant* may be sued in a state with which it has only minimal contacts and can be made to go to the expense and inconvenience of litigating in a distant forum. This is, therefore, the first occasion for the Court to address the question of whether a state court may properly include as members of a plaintiff class persons who reside outside the forum State and whose only connection with the forum is their membership in the plaintiff class.[1]

To make the necessary analysis, it is useful to begin with the constitutional provision at issue here, the second clause of the first section of the Fourteenth Amendment. It provides "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .." Thus, the question in this case is whether any person (*i.e.*, any non-resident of Kansas) has been or will be deprived of any property (*i.e.*, a

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[1] Similar questions were presented in *Gillette v. Miner*, 454 U.S. 86 (1982), but following briefing and argument this Court dismissed the writ for lack of a final judgment.

claim against petitioner) without due process of law, as a result of the certification of a nationwide class. As we demonstrate in Part II, not only has there been no deprivation of any property rights of any non-Kansas class member, but the availability of the nationwide class has conferred a substantial benefit on a significant number of class members who were able to obtain a favorable judgment in a situation in which an individual action might not have been economically feasible. Before turning to that discussion, we first demonstrate why petitioner's due process claim should be dismissed for want of federal jurisdiction.[2]

I. THE COURT SHOULD NOT DECIDE THE DUE PROCESS CLAIM ASSERTED BY PETITIONER.

This case presents the Court with what is, at best, a highly anomolous and unconventional claim: Phillips, the defendant below, seeks to champion the property rights of more than 28,000 of its adversaries—the non-Kansas class members—and has urged this Court to protect those rights by throwing their claims, now reduced to judgments, out of the court. There are two closely related reasons why this Court should dismiss petitioner's due process claim for want of jurisdiction.

First, the due process claim is not being raised by individuals whose rights are subject to possible deprivation, but by their adversary. The Fourteenth Amendment rights at issue here are the property rights of non-Kansas class members to be paid interest on their royalty income from Phillips. Phillips has not suggested that any of its property rights are jeopardized by the nationwide class action device. While petitioner does not specifically identify who it is that is depriving the non-Kansas class members of their rights, it can

[2]We do not urge dismissal of petitioner's choice of law claims. However, we agree with respondents that the courts below did not err in their resolution of the choice of law questions. Moreover, it should be stressed that the choice of law question in no way affects the Court's determination on the due process issue. Had it been necessary, the Kansas courts could have properly structured the class, through the use of appropriate sub-classes, to apply the laws of different fora to various subgroups within the class.

only be the named plaintiffs, whose interests are identical to those of the rest of the class, and the Kansas courts, which are wholly neutral in this matter. Thus, if any such deprivation is taking place, it is plain that petitioner lacks standing to complain about it since petitioner is suffereing no injury at all.[3]

The law in the federal courts is clear that questions of justiciability, including those of standing, are matters of federal law. Thus, the fact that the Kansas courts have entertained the petitioner's due process claim does not require its consideration by this Court. *See, e.g., Tileston v. Ullman,* 318 U.S. 44 (1943); *Coleman v. Miller*, 307 U.S. 433, (1939)(Frankfurter, J., concurring). The general rule in federal courts is that a party has standing only to raise claims that are personal to him and that the courts will not allow one person to advocate the rights of another. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Barrows v. Jackson,* 346 U.S. 249, 255 (1953). *See generally,* Note, *Standing to Assert Constitutional Jus Terii,* 88 Harv.L.Rev. 423 (1974).

Despite petitioner's suggestions, *Hanson v. Denckla*, 357 U.S. 235 (1958), is not to the contrary (Pet. at 5 n.5). There this Court recognized the general prohibition against vindicating the rights of absent third parties, but found the rule inapplicable because of Florida law, which made a trustee an indispensible party to claims involving a trust, and thereby gave any defendant in the action, even one properly before the Florida court, a right to object to the lack of jurisdiction over the Delaware trustee. *Id.* at 244-45. By contrast, nothing in the law of Kansas, or for that matter of any other state, gives petitioner an independent right to object to the inclusion of additional non-resident members of the plaintiff class. In essence, what petitioner is claiming here is that it has the constitutional right to choose to be sued in each of the fifty states—not just Kansas—and that the due process rights of non-Kansas class members are the source of that constitu-

[3] This is not a case in which a class action could have been avoided, since there are approximately 1,000 Kansas residents in the class.

tional right. No case has ever held that a defendant may assert any claim of that kind in federal court.

While this Court has recognized certain limited exceptions to the general rule and has, on rare occasions, allowed one person to argue for the rights of another, each of those cases involved special relationships, directly tied to the underlying litigation claim. Thus, this Court has allowed suits by schools on behalf of their students, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), physicians on behalf of their patients, *Doe v. Bolton,* 410 U.S. 179, 188 (1973), and organizations on behalf of their members, *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 342-43 (1977). Furthermore, unlike this case, those cases often involved situations where the real party in interest was incapable of effectively asserting its rights. None of these cases, however, bears any resemblance to the situation presented here, where not only is there no special relationship between Phillips and the non-Kansas class members, but they are in fact adversaries.

Moreover, insisting upon strict adherence to the law of standing is particularly appropriate in this context since objections which are based on the due process clause of the Fourteenth Amendment are, unlike subject matter jurisdiction, personal to the individual and can be waived. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea,* 456 U.S. 694, 699 (1982). This factor has generally been found to be important by this Court in deciding whether to allow the assertion of the rights of another, permitting it to be done only in very limited circumstances. *See Singleton v. Wulff,* 428 U.S. 106, 113-116 (1976). Morever, this factor assumes critical significance here, where all class members, including non-Kansas residents, received actual notice of this litigation and had a meaningful opportunity to opt out, and thus at least arguably have waived any due process objection which they may have had.[4]

[4] The fact that under the class action rules of Kansas, as well as under Rule 23, Fed.R.Civ.P., and the civil rules in many states, a defendant is entitled to raise various objections in opposing a motion for class certification does not confer standing on petitioner to raise the constitutional claim in this Court. The rules governing objections to class certification serve two distinct functions: *first,* permitting the defendant to protect its interest in assuring, *inter alia,* that the class members have a common claim, that the named-plaintiffs' claims are typical, and that the class definition is not overly-inclusive; and *second,* protecting the interests of the absent class members in assuring that the representation is adequate and that the class is not under-inclusive.

With respect to the first set of issues, defendants have a right to raise those objections to protect their own interests since it is these interests, at least in part, that the rules are intended to protect. With respect to the second set of issues, the rules confer on defendants the right to raise those objections solely to assist the court in its function of protecting the interests of absent class members. In no sense, however, can these procedures be read to confer a broad, unbridled right on defendants to raise any and all interests the absent class members might assert. On the contrary, to the extent that these rules confer "standing" on defendants to raise issues which they would not otherwise be entitled to raise, this grant of standing is not limitless, but is constrained by the rules which confer it. Here, there is no suggestion that any *federal* rule of civil procedure, any federal statute, or any rule of this Court permits defendants to raise the due process rights of members of a plaintiff class in opposing class certification. Thus, the fact that a defendant might have standing to raise this objection in a Kansas court is no basis for a finding that it also has standing to raise it in a federal court. Finally, to *amicus'* knowledge, no court has ever focused on the question of a defendant's standing to raise issues not expressly encompassed by the class action procedures in opposing class certification.

Most important of all for purposes of this case, no prior decision has ever allowed one party to champion the interests of another when they are in fact in a direct adversary relationship, as Phillips is to the entire 28,100 member class, including the non-Kansas members whose due process rights Phillips is pleading before this Court. It is no more proper, we submit, for Phillips to be urging this Court to "protect" the due process rights of non-Kansas class members by throwing out the judgments which have been obtained by respondents on their behalf, than it would be for the proverbial fox to be complaining to the farmer that the mother hen is not adequately caring for her baby chicks. Surely, had Phillips won below it would now be arguing that all class members were in fact bound by the adjudication in Phillips' favor. Thus, given the clear conflict of interest between Phillips and the non-Kansas class members, it would turn the law of standing on its head to permit Phillips to proceed to advocate the due process rights

of its adversaries—the non-Kansas class members—before this Court.

There is a further reason for not reaching the due process claim: not only is it being asserted by a party without standing to raise it, but it also lacks a concrete, fact-specific setting in which it may be decided. This Court has often emphasized the necessity of a firm factual basis as a predicate for adjudicating important constitutional claims. *See United Public Workers of America v. Mitchell,* 330 U.S. 75, 90 (1947); *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962). Although there is no reason for departing from that practice here, Phillips urges this Court to ignore these questions of ripeness and to issue a sweeping constitutional ruling on the basis of a highly theoretical and abstract legal argument that is not grounded on the facts. Phillips has wholly failed to identify a single individual whose due process rights have been infringed or to demonstrate in some non-conjectural way how the non-Kansas class members have been harmed. No class member has come forward, and given the highly favorable disposition of this action from respondents' standpoint, it is difficult to see how any class member, regardless of state of residence, has been harmed. Petitioner's complete failure to provide a concrete setting for the adjudication of its broad due process claim provides a further basis for dismissal of this claim for want of federal jurisdiction. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346-48 (1936)(Brandeis, J., concurring).[5]

[5] In the due process cases cited in Point II *infra,* this Court has on a number of occasions determined that it is necessary to look at the particular circumstances of the alleged deprivation rather than attempting to resolve broad, generalized claims. *See, e.g., Lassiter v. Department of Social Services,* 452 U.S. 18, 31-32 (1981); *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973).

II. INCLUDING NON-KANSAS RESIDENTS AS MEMBERS OF THE PLAINTIFF CLASS DID NOT DEPRIVE THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

As noted above, *amicus* believes that there are no decisions of this Court which deal directly with the situation presented here. Most of the cases on which petitioner relies involve attempts to sue defendants in jurisdictions where they have few, if any, contacts. On the other hand, respondents' principal cases are at least arguably distinguishable because they involve plaintiff classes with a direct connection with the forum state through, for example, the existence of real or personal property in the state, *Hansberry v. Lee,* 311 U.S. 32 (1940), *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), or the issuance of an insurance or similar policy from the headquarters in the state in which the litigation took place, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938).

There is, however, a line of Fourteenth Amendment due process cases that provides a bridge by which the analytical void can be spanned—those decisions involving the issue of to what extent due process protects individuals from deprivations by administrative actions of federal and state agencies. *See, e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972). Of particular significance in this case, since there is no question that the non-Kansas class members have a protected property right in their claim against Phillips for interest owed on royalty payments, is *Mathews v. Eldridge,* 424 U.S. 319 (1976), which sets forth the proper analysis of "what process is due" before a state may deprive a person of an interest protected by the Fourteenth Amendment. Although *Roth* and *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and the analysis required, are identical. *See Lassiter v. Department of Social Services,* 452 U.S. 18, 33 (1981)(due process standards are intended to ensure that "judicial proceedings are fun-

damentally fair"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982) (determining amenability of defendant to suit by utilizing due process cases including *Mullane, Roth* and *Mathews*).

This approach to the due process rights of non-Kansas class members has not been argued by either party, nor was it discussed by the courts below. Nonetheless, we believe that this analysis is appropriate in determining whether an unconstitutional deprivation would occur if the non-Kansas class members were bound by the decision in this case. Indeed, the balancing of interests required by *Mathews v. Eldridge* produces an inquiry which is substantially the same as that under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which was described by this Court in *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977), as a determination of "whether the standard of fairness and substantial justice has been satisfied." Or, as this Court described the standard in *Hansberry v. Lee*, *supra*, 311 U.S. at 42, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are bound by it."

In *Mathews*, this Court required the balancing of three separate factors to determine what process is due:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335.

Accordingly, we will consider each of the three in turn.

1. *The Private Interest*

The property interest at stake when this litigation was instituted was each class members' claim against Phillips for the interest owed on royalty payments. At the time that this case was filed, it might have been possible to estimate

roughly the value of each class member's claim simply by multiplying the royalties paid over the relevant time period by some standard measure of interest. This estimate, however, would then have been discounted by factoring in a variety of intangibles—the risks of litigation, the choice of law questions which could arguably affect the interest rate to be paid, and the costs and attorneys' fees which would inevitably attend litigation to compel Phillips to pay the interest. Indeed, it appears from the failure of any other class members to file representative actions and the lack of substantial individual litigation to recover the interest on the royalties, that when this action was instituted, most class members perceived their economic stake as insufficient to warrant their own efforts to recover what eventually turned out to be a judgment averaging $100 per class member, before expenses and attorneys' fees. Had the class members' stake been more substantial, there clearly would have been a multiplicity of actions. And if any class member believed that his or her interest was sufficient to warrant the cost of an individual action, the guaranteed opt-out under Kansas' procedures provided absolute protection for that member, whether or not a resident of Kansas.

Moreover, in the event that respondents failed in their claims against Phillips, each class member would have lost only the value of his or her claim, but no class member would have had to pay a penny on account of any adverse judgment. In this respect, this case poses a far different question than one in which there is a defendant class. This distinction between a losing plaintiff and a losing defendant is one which former Chief Judge Henry J. Friendly found convincing in his oft-cited article, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1295-96 (1975)("For starters, I would draw a distinction between cases in which the government is seeking to take action against a citizen from those in which it is simply denying a citizen's request . . . whatever the mathematics, there is a human difference between losing what one has and not getting what one wants.") *Cf. Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853

(1982)(distinguishing for First Amendment purposes between removal of library books and refusal to acquire them). Thus, for most class members this litigation entailed little economic risk and the possibility of a modest gain.

While comparisons between deprivations may be somewhat subjective, it is worth noting several instances in which this Court has recently found a deprivation not to be serious enough to warrant additional due process protections. Thus, in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court did not consider that a student's interest in avoiding an undeserved paddling was sufficiently serious to warrant a neutral, prior determination of fault because of the potential tort remedies available should the punishment have been wrongly inflicted. In *Lassiter v. Department of Social Services, supra,* the Court concluded that even the permanent removal of parental rights to a child on account of neglect was not so serious as to require an appointed attorney in every case. And in *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78 (1978), the Court agreed that, despite being dismissed from medical school without a formal trial, the plaintiff had received adequate procedural protection. Thus, considering the fact that the interest at stake here was merely an unliquidated claim which would have had no value in the absence of this successful litigation, the private interest in additional process for non-Kansas class members is clearly not significant. And when the protections afforded the non-Kansas class members here are measured against the very limited ones afforded in *Ingraham*, *Lassiter*, and *Horowitz*, which were found sufficient to satisfy due process, it is difficult to see how the rights of any class members have been violated.

2. *Risk of Erroneous Deprivation*

This element has two components, the first encompassing an estimate of the likelihood of error from denying the added process, and the second requiring an estimate of the probable value of any additional safeguards. *Mathews v. Eldridge, supra,* 424 U.S. at 335. Once again, it is necessary to focus the inquiry on precisely which safeguards were and were not

available, depending on whether the plaintiff class was limited to Kansas residents. In cases in which an out-of-state defendant has sought to avoid being sued, the due process concerns have centered on the burdens of being required to litigate in a distant forum, principally the added costs and inconvenience, and the risk of a default judgment from not contesting the claim. *See, e.g., Kulko v. Superior Court of California,* 436 U.S. 84, 91 (1978). Added safeguards in that context increase fundamental fairness by permitting the defendant to litigate at "home" or in some other, more convenient, forum.

The safeguards issue regarding non-Kansas class members presents a rather different set of considerations. Initially, it should be noted that, except for the named plaintiffs, the entire plaintiff class, Kansas and non-Kansas residents alike, is in the same situation regarding potential additional safeguards. All of the class members are being represented by Kansas attorneys, who the Kansas courts must decide adequately represent the interest of all class members. If there is adequate representation, then there is nothing for unnamed class members to do in order to protect their interests.[6]

The only time that the distinction between Kansas and out-of state residents could make a difference is if there were dissatisfaction with the representation. If class members wished to bring in their own counsel, it might be less convenient to do so for a non-resident, but only if that person wanted to use an out-of-state attorney, or if he or she wished to play a personal role in the litigation. And if either a resident or a non-resident is sufficiently dissatisfied, they can opt out, with no additional difficulty for the out-of-stater. Indeed, here 3,400 putative class members exercised their right to opt out. They were then free to litigate on an individual basis

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[6] Most class action cases do not require the direct participation of class members, so there is little likelihood that class members would have to travel to Kansas. Typically, the class members' active participation is limited to the proof of claim stage, and that is usually accomplished by filing claims by mail. Thus, in all but the rarest case, there would be no greater burden on non-residents than residents.

against Phillips in their own state of residence or in any other place where Phillips might properly be sued. Thus, the benefit of the added safeguard—being able to participate directly in this controversy, either in this litigation or in a separate action—is minimal, especially in light of the nature of the claim, the amount in dispute, and the availability of suit in other fora. While it may be that in some cases, some out-of-state class member may be disadvantaged in some unknown way, as this Court observed in *Mathews* in commenting on this second element, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344.

It is also important to emphasize what is not involved here. This is not a case where class actions have been filed in several states, and Kansas is seeking to require all of the plaintiffs to litigate in its courts. To *amicus'* knowledge, even though Phillips' failure to pay interest on these royalty payments took place years ago, this is the only representative action pending. Thus, whatever the Kansas courts might be required to do when there are non-resident class members actually, and not merely theoretically, interested in maintaining their own actions, there is no basis here to believe that any additional protection in the form of allowing others to litigate their cases elsewhere is wanted, let alone warranted or constitutionally mandated.

It is also worth underscoring what it is that petitioner suggests that the Constitution requires non-Kansas class members to surrender in exchange for the right to litigate their claims in their own states. There are, in the person of respondents, with the assistance of their counsel, class members who are prepared at their own expense to take on the class' cause. The Kansas court have agreed to adjudicate the case, and they have established procedures to ensure that all class members, regardless of their state of residence, are adequately represented and were fully notified of this proceeding. If petitioner prevails on its due process argument, the

majority of class members will be stripped of the benefits of the outstanding judgment against Phillips and have to go elsewhere to find representation, a highly unlikely event, except perhaps in those few states where there are enough class members to justify the cost of bringing suit.[7] It may be that a few class members would follow that path, assuming that by now their claims are not time-barred. But for most, if this case does not go forward on a nationwide basis, their claims will never be converted into judgments and will probably never even be the subject of another legal action. If it is the rights of these class members that the due process clause is intended to protect, it is difficult to imagine how their lot is improved if petitioner's view of the law is accepted.

3. *The Governmental Interest*

An analysis of this aspect of the due process balance further demonstrates the uniqueness and untenability of petitioner's claim. In the typical due process case, the government argues that it should not be made to do more than it is already doing. Here, by contrast, Kansas is already doing *more* than petitioner says due process allows, *i.e.*, agreeing to take on the burden of handling a class composed not only of approximately one thousand residents, but thousands of others who have no direct connection with the State. Thus, the inquiry must focus on the interest of Kansas, which is the only State which has expressed any interest in this litigation. If Kansas is willing to take on the added burdens, it is difficult to see what aspect of due process prevents it from doing so. Moreover, to limit the class to Kansas residents would undermine the State's policy to provide an adequate means, through the more effective device of a nationwide class, of vindicating the rights of its residents who were injured in the manner found here.

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[7] In light of each class member's relatively modest stake in this litigation, and the fact that many jurisdictions have few class members, striking down the nationwide class action device will mean, as a practical matter, that many of the class members will not be able to pursue their claims at all because of the financial burdens which are inevitable in this sort of litigation.

Arguably, the governmental interest here might be that of other states in having a forum to enable their residents to litigate there. However, that interest would be relevant only if, contrary to the history of this litigation, a resident of another state filed his or her own class claim, and Kansas was depriving that other state of hosting that lawsuit.

There is another, more basic, reason why the governmental interest is strongly opposed to the claim of petitioner. In its brief, petitioner implicitly suggests that no state could constitutionally entertain a unified action that encompasses all 33,000 potential class members. Indeed, while petitioner suggests that other states, namely, Oklahoma and Texas, have a closer relationship to the facts giving rise to this case and have greater numbers of class members as residents, petitioner avoids grappling with the question of whether it would have been proper for either of those states to entertain a nationwide class action suit. If petitioner is correct, the result will be not one but at least 50 lawsuits, with several states having to deal with cases with just a few class members.[8]

Surely, the governmental interest in efficient and speedy resolution of claims is not advanced by interpreting the Constitution to require a multiplicity of class or individual actions in lieu of a single action brought in Kansas. Indeed, even in the context of a defendant's claim not to be subjected to litigation in a State other than its residence, this Court recognized in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), that the "burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies . . .." Plainly, that in-

[8] Petitioner's analysis cannot turn on sheer numbers of "resident" class members. For class members residing in Maine or Alaska, their due process rights are no more protected or in jeopardy if this case goes forward in Oklahoma than they are if it proceeds in Kansas. The proper inquiry, we suggest, is whether the forum state provides adequate protection for all class members, including both residents and non-residents.

terest will be seriously undermined if petitioner's view of the law is adopted.

Although petitioner's brief seems to suggest that a person's rights cannot be finally determined unless he is actually a party before the court, there is no such hard and fast rule. In a number of cases involving the doctrines of collateral estoppel and *res judicata*, the courts have recognized limited exceptions in which non-parties may be bound by prior judicial determinations. *See, e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 94-102 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). As the thoughtful opinion of Judge Wisdom in *Southwest Airlines* indicates, courts will carefully examine the claim that non-parties are bound, and will permit that to occur only when there is an identity of interest with the prior litigants, and where the interest of the non-party has been adequately represented by them. Since here the interests of the class members and respondents are the same, and since the Kansas courts have taken measures to ensure adequate representation, these cases lend further support for the proposition that due process does not prevent inclusion of all 28,100 class members.[9]

If this Court were to rule that no one state could entertain a class action such as this, the states might well seek from Congress, and Congress might well enact, a new jurisdictional provision allowing multistate class actions to be brought in federal courts, regardless of the amount in controversy. However, even this solution may be unconstitutional under petitioner's theory. Although petitioner appears to suggest that a federal alternative is somehow different, it never acknowledges that it would be constitutional for Congress to

[9] Another example of a situation in which this Court has allowed a state court to adjudicate important rights, even though one of the parties had no connection whatsoever with the forum state, is the area of divorce. *See, e.g., Williams v. North Carolina*, 317 U.S. 287, 297-99 (1942). While the divorce area is factually distinguishable from the class action involved here, the divorce decisions nonetheless demonstrate that the mechanical boundary line which petitioner seeks to erect is not constitutionally based.

allow this case to be heard in a single federal court. In part, this may be due to the requirement in diversity suits that, at least until now, the rules regarding personal jurisdiction are those of the forum state. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, supra,* 456 U.S. at 707-709, *id.* at 711-713, (Powell, J., concurring). *Cf. Califano v. Yamasaki,* 442 U.S 682, 702-03 (1979) (nationwide class upheld based on federal claim). Thus, accepting petitioner's theory might well make it impossible for even the federal courts to handle multi-state plaintiff diversity class action cases where state courts could not constitutionally do so.

Of course, all of these problems can be avoided by concluding that due process is not violated when a state court includes non-residents in its class actions, at least where there is no other state in which similar claims are pending, where all class members receive actual notice and have an unqualified right to opt-out, and where the court finds that the plaintiff and his counsel adequately represent all members of the class. In this connection, it would be well to recall the admonition of this Court in *Mathews v. Eldridge, supra,* that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the . . . programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." 424 U.S. at 349. Kansas' judgment that non-resident members of the plaintiff class are adequately protected is plainly a reasonable one which should be upheld. Nothing in the concept of due process requires Kansas to accept a nationwide class, but if it chooses to do so, due process does not forbid it.

4. *The Balance Lies Decidedly In Respondents' Favor*

Having reviewed all three factors, the Court must strike an appropriate balance to decide whether the process given out-of-state class members is adequate. In doing so, the Court should keep in mind there is no claim that any other aspect of this action was handled in a manner that would jeopardize the constitutional rights of the non-Kansas class members, *i.e.*, notice was inadequate, the claims of respondents were not

typical or were antagonistic to the other members of the class (*see Hansberry v. Lee, supra*), or respondents and their counsel did not adequately represent the interests of class members, both Kansas and non-Kansas residents.

Based on these considerations, it seems clear that non-Kansas class members have received all the process to which they are due. None of them has expressed any interest in separate class litigation on their claims, nor would a nationwide class preclude them from proceeding alone, if they elected to opt out and did so in a timely fashion. There are no other protections that are likely to reduce the risk of an erroneous loss of their claim, and the government interest in not having multiple class suits is very strong. Therefore, even if there had been an unfavorable judgment in this case, which non-Kansas class members sought to attack by claiming that they were denied due process, there is no basis for concluding that the fact of non-residence alone would entitle them to argue that the Kansas courts had deprived them of property without due process of law.

As this Court observed in *Kulko v. Superior Court of California, supra,* 436 U.S. at 92, the concept of due process is "not susceptible of mechanical application . . .." *See also Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961)(rejecting fixed rules of due process in favor of flexible approach balancing the governmental and private interests involved). In light of those decisions, and when judged by the standard of *Mathews v. Eldridge*, there can be no doubt that the out-of-state class members in this case have received all of the process that they are due. As this Court recognized in *Mathews*, "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." 424 U.S. at 348. If petitioner is correct that at least fifty separate actions are required, it is plain that the line will have been crossed, and the costs to society will be too great to require it. Accordingly, the Court should affirm the judgment below.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

Alan B. Morrison
David C. Vladeck
(Counsel of Record)

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Amicus Curiae
Public Citizen

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